FILE COPY

FEB 15 1973

MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term 1972

NO. 72-419

PITTSBURGH PRESS COMPANY, *Petitioner*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS, ET AL.

JOINT BRIEF OF AMICI CURIAE

AMERICAN VETERANS COMMITTEE, INC.;
WOMEN'S EQUITY ACTION LEAGUE LEGAL DEFENSE AND EDUCATIONAL FUND, INC.;
NATIONAL ASSOCIATION OF WOMEN LAWYERS;
LEAGUE OF WOMEN VOTERS OF THE UNITED STATES.

PHINEAS INDRITZ
1333 Connecticut Avenue, N. W., Washington, D. C. 20036
ELIZABETH BOYER
7657 Dines Road, Novelty, Ohio 44072
MARGUERITE RAWALT
1600 South Joyce St., Arlington, Va. 22202
MARTHA W. GRIFFITHS
1536 Longworth House Office Bldg., Washington, D. C. 20515
MARGARET M. HECKLER
303 Cannon House Office Bldg., Washington, D. C. 20515
DONALD M. FRASER
1111 Longworth House Office Bldg., Washington, D. C. 20515
Attorneys for Amici Curiae

February 15, 1972

Washington, D.C. • THIEL PRESS • (202) 393-0625

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
THE FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The statutory prohibition against discriminatory job ads is rationally related to the legislative objective of stopping unlawful discriminatory employment practices and is therefore a valid legislative enactment.	7
A. Employment advertising under sex-labeled headings reinforces sex prejudice and frustrates the objective of a fair employment law.	11
B. There is no merit in the Petitioner's suggestion that sex-segregated job ads promote the convenience of the job seeker.	18
II. The Pittsburgh ordinance as enforced by the Court below – requiring the Petitioner to cease sex-segregated labeling for job ads in its newspapers unless the advertiser or position is exempt under the Ordinance – regulates the commercial activity of selling advertising space, imposes little or no burden on the Petitioner, and does not abridge the freedom of speech or of the press within the meaning of the First Amendment.	29
III. The order of the court below did not violate due process, and the Petitioner's "due process" argument misapprehends the basis for that order.	36
CONCLUSION	37
APPENDIX: State Fair Employment Laws Prohibiting Sex Discriminatory Advertising	39

TABLE OF CITATIONS

Cases:

American Newspaper Publishers Association v. Alexander, 294 F.Supp. 1100 (D.D.C. 1968) 10

Anderson v. Martin, 375 U.S. 399 (1964) 14

Associated Press v. NLRB, 301 U.S. 103 (1937) 32

Associated Press v. United States, 326 U.S. 1 (1945) 32

Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1969), cert den. 396 U.S. 842 (1969) 33

Bartmess v. Drewrys U.S.A., 444 F.2d 1186 (CA 9, 1971) 9

Bob-Lo Excrusion Co. v. Michigan, 333 U.S. 28 (1948) 7

Branzburg v. Hayes, 408 U.S. 665 (1972) 32

Breard v. Alexandria, 341 U.S. 622 (1951) 33

Brush v. San Francisco Newspaper Printing Co., 315 F. Supp. 577 (D.C. N.D. Calif. 1970), aff'd. 469 F.2d 89 (CA 9, Sept. 19, 1972), *Pet. for cert.* pending No. 72-880 11

Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), affg. 333 F. Supp. 582 (D. D.C. 1971) 33

Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) 33

Commission v. Evening Sentinel, (FEP-Sex 1-5, 29-1, Conn. Comm. Hum. Rts., June 30, 1972) 28

Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (CA 5, 1971), cert. den., 404 U.S. 959 (1971) 9

District of Columbia v. Thompson Co., 346 U.S. 100 (1953) 7

Edwards v. California, 314 U.S. 160 (1971) 18

EEOC v. Bell System, CA 73-149, U.S. Dist. Ct., E.D. Pa. (Jan. 18, 1973) 29

Georgia v. United States, 201 F. Supp. 813 (D.C. N.D. Ga. 1961), affd. 371 U.S. 9 (1962) 18

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 9

Grosjean v. American Press Co., 297 U.S. 233 (1936) 32

Hailes v. United Air Lines, 464 F.2d 1006 (CA 5, 1972) 13, 22

Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963) 7

Henderson v. United States, 339 U.S. 816 (1950) 18

Hernandez v. Texas, 347 U.S. 475 (1954) 19

Hinfrey v. Red Bank Register (E13BS-4806, N.J. Dept. of Law & Pub. Safety, Div. on Civ. Rts., Oct. 27, 1971) 28

Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268 (1934) 32

Iowa Civ. Rts. Comm., Order, Labor Rel. Rep. FEP 451:407, 1972 . . . . . 28, 29

Local 189, United Papermakers, etc. v. United States, 416 F.2d 980 (CA 5, 1969) 9

Lorain Journal Co., v. United States, 342 U.S. 143 (1951) 32

Mabee v. White Plains Publ. Co., 327 U.S. 178 (1946) 32

Mitchell v. United States, 313 U.S. 80 (1941) 18

Morgan v. Virginia, 328 U.S. 373 (1946) 18

Morrow v. Mississippi Publishers Corp., 5 FEP Cases 287 (D.C. S.D. Miss., Nov. 27, 1972) 11

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 32

New York State Broadcasters Assn. v. United States, 414 F.2d 990 (CA 2, 1969), cert. den. 396 U.S. 1061 (1970) 32

New York Times v. Sullivan, 376 U.S. 254 (1964) 34

Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186 (1946) 32

Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971) 7, 9

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 4 Pa. Cmwlth. 448, 287 A. 2d 161 (1972) 5

Railway Express Agency v. New York, 336 U.S. 106 (1949) 7

Railway Mail Ass'n. v. Corsi, 326 U.S. 88 (1945) 7

Reed v. Reed, 404 U.S. 71 (1971) 7

Rosenfeld v. So. Pac. Co., 441 F.2d 1219 (CA 9, 1971) 9

Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 485 P.2d 529 (1971) 20

Smith v. California, 361 U.S. 147 (1959) 34

United States v. Bob Lawrence Realty, 313 F. Supp. 870 (D.C. N.D. Ga. 1970) 32

United States v. Hunter, 459 F.2d 205 (CA 4, 1972), cert. den. 93 S. Ct. 235 (Oct. 16, 1972) 35

United States v. Mintzes, 304 F. Supp. 1305 (D.C. D. Md. 1969) 33

United States v. Mitchell, 327 F. Supp. 476 (D.C. N.C. Ga. 1971) 33

Valentine v. Chrestenson, 316 U.S. 52 (1942) 33

Weeks v. Southern Bell Tel. & Tel. Co., (CA 5) 408 F.2d 228 (1969) and 467 F.2d 95 (1972) 7, 9

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 7

Miscellaneous:

Baltimore Ord. 103, 1963-64, as amded. sec. 10(3)(iii) 8

Boyer, "Help-Wanted Advertising–Everywoman's Barrier," 23 Hastings L.J. 221, 223, ftnt. 7 (Nov. 1971) 34

Census Bureau, 1970 Census of Population
PC(1)-C1, General Social and Economic Characteristics, U.S. Summary, Table 112, p. 1-418 (June 1972) 24
PC(2)-7C, Occupation by Industry, Table 8, pp. 241-248 (Oct. 1972) 24

Civil Rights Act of 1964, Title VII, sec. 704(b) (78 Stat. 241, 42 U.S.C. 2000e-3(b)) 8, 10, 15, 37

Civil Rights Act of 1968, sec. 804(c) (42 U.S.C. 3604(c)) 35

Congressional Record, February 17, 1972, pp. E1234-E1272 12

Department of Labor, Office of Federal Contract Compliance, Sex Discrimination Guidelines:
Hearings, August 6, 1969 13
Guidelines: 41 C.F.R. 60-20.2(b); 35 F.R. 8888 (June 9, 1970) 11

Department of Labor, Women's Bureau
"Fact Sheet on the Earnings Gap," (Dec. 1971, rev.) 16
"Laws on Sex Discrimination in Employment", 1970, and supplement of May 1, 1972 8

Economic Report of the President, Jan. 1973 (H. Doc 93-28), pp. 89, 90, 96, 99 14

Employment Act of 1946 (60 Stat 23, 15 U.S.C. 1021) 14

Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex: 29 C.F.R. 1604:
31 F.R. 6414, April 28, 1966 9
33 F.R. 11439, August 1968 9
37 F.R. 6835, April 5, 1972 . . . . . 9, 10

EEOC, Hearings on Sex Discrimination (May 1967) 9

EEOC, Sixth Annual Report (F.Y. 1971), p. 1 15

EEOC, "Toward Job Equality for Women", p. 5 (1969) 9

Equal Pay Act of 1963 (77 Stat. 56, 29 U.S.C. 206(d)) 15

Executive Orders 11246 (30 F.R. 12319) and 11375 (32 F.R. 14303) 10

Federal Communications Commission Docket 19143 . . . . . 12, 13, 29

Hacker, H.M. "Women as a Minority Group", 30 Social Forces 60 (Oct. 1951) 19

Hearings on Section 805 of H.R. 16098 before Special Subcommittee on Education of House Committee on Education and Labor, 91st Cong., part 2, pp. 889-896 (1970) 13

Interstate Commerce Commission, Regulations, September 1961 (49 C.F.R. 180a.1-10) 17

MEDIA RECORDS 16, 18, *Classified Advertising of the First Fifty Sunday and Morning Newspapers* (1970) 34

Minneapolis, Minn. nondiscrimination ordinance (Nov. 23, 1971) 8

Myrdal, Gunnar, "An American Dilemma", Appendix 5, pp. 1073-1078(1944) 19

New York City Administrative Code, Law on Human Rights, sec. B1-7.0, as amded. May 1972, ¶¶1(d), 1a(d), and 6 8

Pennsylvania Department of Public Instruction, "Training the Woman to Know Her Place: The Social Antecedents of Women in the World of Work", (1971) 13

Pennsylvania, Human Rel. Act (43 Purdon's Penn. Stats. Ann. sec. 955) 9

Pennsylvania Human Rel. Comm. Guideline, 1 Pa. Bull. 2359, sec. 2; CCH-Employment Practices Guidelines ¶27,296.02(A) 10

Pittsburgh Ordinance 75, approved Feb. 28, 1967 (68 City Clerk's Records 511), as amended by Ordinance 395, approved July 7, 1969 (70 *Ibid.*, 691) . . . . . *passim*

President's Task Force on Women's Rights and Responsibilities, Report, "A Matter of Simple Justice," (April 1970) p. 18 21

State Fair Employment Practice Laws prohibiting sex discriminatory advertisements . . . . . Appendix, 39

Washington Post, p. A-7 (Jan. 11, 1973) 25

PITTSBURGH PRESS COMPANY v. THE PITTSBURGH COMMISSION ON HUMAN RELATIONS, *et al.*, No. 72-419, October Term, 1972

JOINT BRIEF OF AMICI CURIAE:
AMERICAN VETERANS COMMITTEE, INC.;
WOMEN'S EQUITY ACTION LEAGUE LEGAL DEFENSE AND EDUCATIONAL FUND, INC.;
NATIONAL ASSOCIATION OF WOMEN LAWYERS;
LEAGUE OF WOMEN VOTERS OF THE UNITED STATES.

INTEREST OF THE AMICI CURIAE

The American Veterans Committee, Inc. (AVC) is a nationwide organization of veterans who served honorably in the Armed Forces of the United States during World War I, World War II, Korean Conflict and Vietnam Conflict, and who have associated themselves, regardless of race, color, religion, sex, or national origin, to promote the democratic principles which they fought to preserve. AVC was founded in 1943 and its membership includes both men and women who participate in AVC's affairs in full equality.

The Women's Equity Action League Educational and Legal Defense Fund, Inc. is the legal-aid arm of the Women's Equity Action League (WEAL), a nationwide organization of women and men, chiefly business and professional, organized "to promote greater economic progress on the part of American women and to press for enforcement of existing anti-discriminatory laws in behalf of women; to seek reappraisal of federal, state and local laws and practices limiting women's employment oppor-

tunities, and to combat job discriminations against women by all lawful means."

The National Association of Women Lawyers is a nationwide bar association of women judges and lawyers, organized in 1899 to "promote the welfare and interest of women lawyers; to maintain the honor and dignity of the profession of the law; to aid in enactment of legislation for the common good; and in the administration of such laws, to secure justice for all." NAWL has worked for many years to advance the legal and economic status of American women by expanding their opportunities to study and practice law, including aiding all women to establish and maintain their constitutional and statutory rights.

The League of Women Voters of the United States is a nonpartisan voluntary organization, open to all women citizens 18 years or older, which promotes informed and active participation by all citizens in government and politics. The League has 160,000 members in more than 1360 local leagues throughout the United States, Puerto Rico and the Virgin Islands.

The *amici* file this Joint Brief because they believe that sex segregation, like race segregation, of job ads produces many harms. *E.g.*, it reinforces ancient prejudices and stereotypes; obstructs equality of work opportunity; impedes numerous job seekers, including members of the *amici* organizations, in their search for employment; frustrates the objectives of fair employment laws; and undermines the national goals of maximum employment and maximum production.

THE FACTS

In October 1969, the City of Pittsburgh's Human Relations Commission began investigation of charges that the Pittsburgh Press Company was violating the City's Human Relations Ordinance[1] by printing its classified job ads with sex-discriminatory labeling. The company publishes the Pittsburgh Press, a newspaper which has a circulation of about 350,000 daily and 750,000 on Sunday in the metropolitan area of Pittsburgh, Penn., and is the Nation's 12th largest newspaper in classified advertisements. The company also processes job ads as agent for the Pittsburgh Post-Gazette, which has a circulation of about 231,000 daily.

Prior to October 1969, the company printed many of its job ads with sex designations within the ad. Although

---

[1]The City's Human Relations Ordinance, which established the Human Relations Commission in the Office of the Mayor, prohibits specified acts of discrimination on the basis of race, color, religion, ancestry, national origin, place of birth or sex, in connection with employment, housing, and public accommodations. (Ordinance 75, approved Feb. 28, 1967 (68 City Clerk's Records 511), as amended by Ordinance 395, approved July 7, 1969 (70 *Ibid.* 691), which added the prohibition against sex discrimination.) The Commission administers and enforces the Ordinance by several methods which are now customarily used by numerous State and local human relations commissions throughout the country; namely, studying human relations problems, issuing reports and publications, making recommendations to the Mayor and City Council, investigating and conciliating complaints of practices defined in the Ordinance as unlawful, certifying exemptions from the Ordinance, holding public hearings, making findings, and issuing cease and desist orders. If the Commission is unable to conciliate the case, it certifies violators of the Ordinance or the Commission's orders to the City Solicitor who then institutes court proceedings to secure enforcement or compliance or to impose a fine of not more than $300.

the job ads were classified alphabetically by occupation, they were segregated in columns captioned "Male Help Wanted," "Female Help Wanted," and "Male-Female Help Wanted." After conferences between the company and the Commission in October 1969, the company abandoned sex designations within the body of the job ad, and changed the column headings to "Jobs–Male Interest," "Jobs–Female Interest," and "Male-Female Help." It also printed a statement (at the beginning of the "male" ads and at the beginning of the "female" ads) asserting that the job ads are thus segregated "for the convenience of our readers."[2]

In printing its job ads, the company made no inquiry as to whether the employer was exempt from the Ordinance, or whether the Commission had exempted the occupation or position by a certificate of exemption under section 7(d) of the Ordinance, as one which "reasonably requires the employment of a person or persons of a particular . . . sex."

After due hearing, the Commission ruled that the company's current method of printing its classified job ads violates the Ordinance. The Commission's reasoning was as follows:

---

[2]The full statement read:

"Notice to Job Seekers"—Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state, and Federal—prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

1. Section 8(e) of the Ordinance makes it an unlawful employment practice for any employer, employment agency, or labor organization to "publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin, place of birth, or sex"; and

2. Section 8(j) of the Ordinance makes it an unlawful employment practice for "any person, whether or not an employer . . . to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice, or to obstruct or prevent any person from . . .complying with . . .this Ordinance . . ."

3. The company's "classification system of employment advertisements with captions containing designations as to sex" aided or compelled the advertiser to use publication of job ads indicating sex differences in jobs, without a certificate of exemption for the advertiser position, and thus violated section 8(j) of the Ordinance.

The Commission issued a cease-and-desist order that Company's classification system of employment ads shall contain "no reference to sex". The company appealed to the Pennsylvania Court of Common Pleas of Allegheny County, which affirmed the Commission's order. On further appeal, the Commonwealth Court of Pennsylvania modified the Commission's order to require company to exclude "all reference to sex in employment advertising column headings except as may be exempt under said Ordinance, or as may be certified as exempt by said Commission." 4 Pa. Cmwlth. 448, 287 A.2d 161 (1972). The Pennsylvania Supreme Court,

without opinion, denied the company's petition for allowance of appeal. This Court granted the company's petition for certiorari on December 4, 1972.

SUMMARY OF ARGUMENT

Sex segregation, like race segregation, of classified job ads reinforces prejudice and frustrates the objectives of a fair employment law. Many newspapers recognize this and have switched to classifying their job ads solely by occupation. Sex segregation of job ads does not serve the convenience of the job seeker. On the contrary, it discourages job seekers, is harmful to employers' and employment agencies' efforts to comply with the law, fosters substantial sex discrimination in employment, and impairs the earning ability of many women (and also of men). The City Council's prohibition against discriminatory job advertising, as applied to the Petitioner newspaper company, simply regulates the commercial activity of selling advertising space. The prohibition is rationally related to the valid objective of stopping unlawful discriminatory practices, imposes little or no burden on the newspaper, and does not abridge its freedom of speech or press. It is therefore a valid legislative enactment. The Petitioner's "due process" argument misapprehends the basis of the lower court's order, and the Petitioner was not denied due process.

I. THE STATUTORY PROHIBITION AGAINST DISCRIMINATORY JOB ADS IS RATIONALLY RELATED TO THE LEGISLATIVE OBJECTIVE OF STOPPING UNLAWFUL DISCRIMINATORY EMPLOYMENT PRACTICES AND IS THEREFORE A VALID LEGISLATIVE ENACTMENT.

The basic purpose of the Pittsburgh Ordinance is to eliminate discrimination based on race, religion, sex, etc., in employment, housing, and public accommodations. It is now indisputable that, under our Constitution, a government may "choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt," *Railway Mail Ass'n.* v. *Corsi,* 326 U.S. 88, 98 (1945) (Frankfurter, J.), and that unless restricted by State law such legislation is within the police power of a municipality. *District of Columbia* v. *Thompson Co.,* 346 U.S. 100, 109 (1953); *Bob-Lo Excursion Co.* v. *Michigan,* 333 U.S. 28, 34 (1948). This Constitutional policy against invidious discrimination is not restricted simply to discrimination based on race or religion – it applies also to discrimination based on sex. *Reed* v. *Reed,* 404 U.S. 71 (1971); *Phillips* v. *Martin-Marietta Corp.,* 400 U.S. 542 (1971); *Weeks* v. *Southern Bell Tel. & Tel. Co.,* (CA 5) 408 F.2d 228 (1969) and 467 F.2d 95 (1972).

Furthermore, in legislating against such discriminatory activities, the legislature may prohibit or regulate advertising practices which the legislature reasonably and rationally believes will promote or exacerbate the problems against which the legislation is validly directed. *Railway Express Agency* v. *New York,* 336 U.S. 106, 108-109 (1949); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 491 (1955); *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963).

Accordingly, Congress, many States, the District of Columbia, Puerto Rico, and various municipalities, including Pittsburgh, have enacted laws and ordinances which prohibit discrimination in employment based on "race, color, religion, sex or national origin", and most of these, including the Federal Civil Rights Act of 1964 (Section 704(b) of Title VII; 42 U.S.C. 2000e-3(b)) prohibit discriminatory job advertising.[3]

The Pittsburgh Ordinance, like the other laws and ordinances, draws no distinction between the word "sex" and the words "race, color, religion or national origin", unless it is shown in "certain instances" that the factor of sex[4] is a bona fide occupational qualification (BFOQ) "reasonably necessary to the normal operation of that particular business or enterprise". (42 U.S.C. 2000e-2(e); sec. 7(d) of the Pittsburgh Ordinance). However, the BFOQ exception is so narrowly limited that hardly any job may lawfully be restricted to one sex on that basis.

---

[3] At least 33 of the 37 States, the District of Columbia and Puerto Rico which prohibit sex discrimination in employment also prohibit sex discriminatory job advertising. See Appendix of this Brief, *post*; and U.S. Dept. of Labor, Women's Bureau, "Laws on Sex Discrimination in Employment" (1970), supplemented to May 1, 1972. Hundreds of cities and counties have human relations commissions operating under a wide variety of nondiscrimination ordinances, many of which prohibit sex discrimination in employment, including sex discriminatory advertising. Examples of the latter are: New York City Administrative Code, Law on Human Rights, as amended May 1972, sec. B1-7.0, ¶¶1(d), 1a(d) and 6; Minneapolis, Minn., Ord. adopted Nov. 23, 1971; Baltimore Ord. 103, 1963-64, as amended, sec. 10(3)(iii); and the Pittsburgh Ordinance in this case.

[4] Religion and national origin (but not race or color) may also be a BFOQ.

Thus, the Guidelines of the Equal Employment Opportunity Commission (EEOC) specifically declare that the BFOQ exception does not warrant sex discrimination in employment "based on assumptions of the comparative employment characteristics of women in general" (*e.g.* turnover rates), or "on stereotyped characterizations of the sexes" (*e.g.*, assembling skills, aggressiveness), or "because of preferences of coworkers, the employer, clients or customers."[5] Indeed, the EEOC recognizes sex as a BFOQ only where it is essential for authenticity (*e.g.*, actor, actress),[6] or required under current community standards of morality or propriety (e.g., ladies' or men's room attendant, fitter of feminine intimate apparel),[7] or for performance of the job (*e.g.*, wet-nurse).[8]

The EEOC initially allowed sex headings on classified job ad columns (31 F.R. 6414, April 28, 1966). But after conducting extensive hearings in May 1967 and experiencing the discriminatory effects of such sex headings, the EEOC amended its Guidelines on sex discrimination in August 1968 (33 F.R. 11439) to

---

[5] 29 C.F.R. 1604.2; 37 F.R. 6835 (April 5, 1972).

[6] *Ibid.*, sec. 1604.2(a)(2). The EEOC Guidelines are accorded great weight. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J.); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (CA 5, 1969); *Bartmess* v. *Drewrys U.S.A.*, 444 F.2d 1186, 1190 (CA 7, 1971); *Rosenfeld* v. *So. Pac. Co.*, 441 F.2d 1219 (CA 9, 1971); *Local 189, United Papermakers, etc.* v. *United States*, 416 F.2d 980, 997 (CA 5, 1969).

[7] EEOC, "Toward Job Equality for Women," p. 5 (1969).

[8] See *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (CA 5, 1971), *cert. den.*, 404 U.S. 959 (1971) (female sex not essential for job of flight cabin attendant, *i.e.*, stewardess).

prohibit the "placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed 'Male' or 'Female' . . ." (29 C.F.R. 1604.5, as reaffirmed on April 5, 1972, 37 F.R. 6835).[9] Shortly thereafter, a Federal court ruled that this EEOC Guideline "represents a reasonable interpretation of section 704(b) of Title VII." *American Newspaper Publishers Association* v. *Alexander*, 294 F. Supp. 1100, 1103 (D. D.C. 1968). The Labor Department's Office of Federal Contract Compliance, which administers Executive Orders 11246 (30 F.R. 12319) and 11375 (32 F.R. 14303) prohibiting discrimination in employment by those holding Federal contracts, issued Sex Discrimination Guidelines in June 1970 containing an

---

[9]The Pennsylvania Human Relations Commission, which administers the State's Human Relations Act (43 Purdon's Penn. Stats. Ann. sec. 955) issued the following Guideline (1 Pa. Bull. 2359, sec. 2; CCH-Employment Practices Guidelines ¶27,296.02 (A)):

"Sec. 2. Discrimination in Employment.–(A)§5(b)(2) provides that it shall be an unlawful practice to publish any advertisement indicating any preference, limitation, specification or discrimination based on sex. The placement of an advertisement seeking applicants for employment in a classified advertisement section under "Help Wanted–Male," or "Help Wanted–Female Interest" or similar columns with a sex designation is considered to be a violation of §5(b)(2) if an employer is covered by the Act and has not received a bona fide occupational qualification exemption from the Commission.

"The mere fact that the newspaper or magazine publishing such advertisements publishes a disclaimer provision advising that applicants of one sex should assume that applicants of either sex will be considered for employment is not considered by the Commission to be a defense to a complaint alleging a violation of §5(b)(2)."

identical prohibition. 41 C.F.R. 60-20.2(b); 35 F.R. 8888.

The Civil Rights Act of 1964 prohibits discriminatory job advertising solely by employers, employment agencies and labor organizations.[10]

However, the City of Pittsburgh's ordinance, like the laws and ordinances of many States and other municipalities, went further than the Federal statute, by prohibiting *any person* from aiding, coercing or participating in publication of the discriminatory job ad. As shown in Part I, A and B, below, this is a reasonable and rational prohibition directly related to the proper statutory objective of eliminating discrimination in employment and is therefore a valid legislative enactment. (Parts II and III deal separately with the Petitioner's First Amendment and Due Process arguments.)

A. Employment advertising under sex-labeled headings reinforces sex prejudice and frustrates the objectives of a fair employment law.

Help-wanted classified advertisements in newspapers constitute a major vehicle for bringing together the job and the job-seeker. They are the single most comprehensive information source on current job openings and the most productive of advertising media

[10] Efforts to apply the advertising prohibition to newspapers on the theory that printing classified job ads makes them employment agencies have had mixed results. *Cf. Brush* v. *San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (D.C. N.D. Calif. 1970), *aff'd.* 469 F.2d 89 (CA 9, Sept. 19, 1972), *Pet. for cert.* pending No. 72-880; *Morrow* v. *Mississippi Publishers Corp.*, 5 FEP Cases 287 (D.C. S.D. Miss., Nov. 27, 1972).

for filling most types of positions.[11] It is now generally accepted that racial or religious labeling of job ads (*e.g.*, "whites only", "blacks need not apply", "no Jews", "colored jobs", "Italian-Americans not acceptable", etc.) impairs the equal employment opportunities of those excluded. Indeed, the Petitioner's Brief (p. 26) states: "We do not contend that employment opportunities are *generally* classifiable along racial or nationality lines." But the Petitioner then goes on to say: "On the other hand, the Press believes that the employment patterns in this country *generally* reflect job interest and qualifications along sex lines." (Emphases by Petitioner.)

We believe that the law was specifically intended to counteract such stereotypes and resulting discrimination in employment, based on sex as well as on race or national origin.

Sex designations, whether in the ad, or as captions on the columns of classified job ads segregated by sex, channel applicants into the jobs labeled for their respective sex. The long standing customs and stereotypes about "men's work" and "women's work", and the traditional prejudices limiting women to the less rewarded and less rewarding kinds of work, reinforce the ads' message of sex selection. The heading "male" or "men wanted" clearly conveys only one meaning–that the advertiser of the jobs under that heading wants men only. Similarly, the heading "female" or "women wanted" clearly says that the jobs in the ads under that heading are for women only.

---

[11] Testimony of Frank Coss, Federal Communications Commission Docket 19143, August 1, 1972, *re* Bell Telephone Company discriminatory employment practices (See Cong. Rec. of Feb. 17, 1972, pp. E1243-E1272). See ftnt. 20, *infra.*

Nor does the Petitioner's "Notice to Job Seekers" (ftnt. 2, *supra*), proclaiming that the job seeker "should assume that the advertiser will consider applicants of either sex", lessen the message of sex discrimination. In *Hailes* v. *United Air Lines*, 464 F.2d 1006, 1009 (CA 5, 1972), the Court ruled:

> "Despite the fact that the ad states that United is an Equal Opportunity Employer, the tendentious selection of the feminine term, 'stewardess', *and the placing of the ad in the 'Help Wanted – Female'* column without a corresponding ad in the 'Help Wanted – Male' column *so plainly indicates a preference for females it cannot be neutralized* by the self-conferred title of 'Equal Opportunity Employer". (Emphasis supplied).

It is plain that placing an employment ad under a sex-segregative heading negates any assurance to the job seeker that the advertiser will consider him or her for employment without regard to his or her sex.

Furthermore, several studies show that the job seeker is substantially deterred from reading the job ads in columns whose headings refer to the other sex, and that the better jobs (in pay, fringe benefits, opportunity for advancement, etc.) are generally listed in the "male" columns.[12] Indeed, the Court of Common Pleas found, on the basis of evidence presented to the Pittsburgh

[12] Hearings on Section 805 of H.R. 16098 before Special Subcommittee on Education of House Committee on Education and Labor, 91st Cong., part 2, pp. 889-896 (1970); Pennsylvania Department of Public Instruction, "Training the Woman to Know Her Place: The Social Antecedents of Women in the World of Work" (1971); Testimony of Frank Coss, *supra*, ftnt. 11; Testimony of Dr. G.H.F. Gardner, Hearings on Sex Discriminatory Guidelines of Office of Federal Contract Compliance, August 6, 1969.

Commission on Human Relations in this case, "that the more attractive employment opportunities consistently appear in the male classification" and "that the classification system used by the [Pittsburgh] Press discourage [sic] women from application for jobs classified for male interest." (App., Pet. for Writ of Certiorari, p. 33a).

Thus, the presence of sex preferences in a newspaper's classified job ads reinforces traditional prejudices and stereotypes about the kinds of jobs that are suitable for men and those suitable for women, and makes it harder for the community to accept and comply with the nondiscrimination policy of the law. As this Court pointed out in *Anderson* v. *Martin*, 375 U.S. 399, 402 (1964), the label "furnishes a vehicle" both for arousing prejudice and for stimulating discriminatory action.

The Economic Report of the President (H. Doc. 93-28), transmitted to Congress on January 31, 1973 (Cong. Rec. S1522, H604), noted that the goals of "maximum employment" and "maximum production" of the Employment Act of 1946 (60 Stat. 23, 15 U.S.C. 1021) apply "equally to men and women". Chap. 4, p. 89. However, it stated:

> Although the goals apply equally to men and women, some of the obstacles to their achievement apply especially to women. Women have gained much more access to market employment than they used to have, but they have not gained full equality within the market in the choice of jobs, opportunities for advancement, and other matters related to employment and compensation. To some extent the cause of this discrepancy is direct discrimination. But it is also the result of more subtle and complex factors originating in cultural

patterns that have grown up in most societies through the centuries. In either case, because the possibilities open to women are restricted, they are not always free to contribute a full measure of earnings to their families, to develop their talents fully, or to help achieve the national goal of "maximum production." [p. 90].

Women have generally experienced more unemployment than men and this differential has been more pronounced in recent years . . . [p. 96]

. . . The unemployment of women who seek work is costly, to themselves, their families, and the Nation. Our goal should be to reduce this unemployment wherever that can be done by means which are not themselves more costly. [p. 99].

The discrimination inherent in sex-segregated job ads has been a major influence in maintaining the sex-based discriminations which still pervade our country, despite the promise of the Equal Pay Act of 1963 (77 Stat. 56, 29 U.S.C. 206(d)), prohibiting sex discrimination in wage payments, and Title VII of the Civil Rights Act of 1964 (78 Stat. 241, 42 U.S.C. 2000e), prohibiting discrimination in employment on the basis of race, color, religion, sex or national origin. About one-fourth of all employment discrimination complaints received by the EEOC are sex-based.[13] These discriminations are largely responsible for the earnings gap between the 36,132,000 male, and the 15,476,000 female, full-time, year-round workers, as shown by the following earnings data reported for such workers during 1970 by the Labor

[13] Equal Employment Opportunity Commission, 6th Annual Report (F.Y. 1971), p. 1.

Department, Employment Standards Administration, Women's Bureau:[14]

TABLE I– Median Earnings, 1970

	Men	Women	Women's earnings as percent of men's
All workers	$ 8,966	$ 5,323	59.4
Professional and technical	11,806	7,878	66.7
Non farm managers, officials, proprietors	12,117	6,834	56.4
Clerical	8,617	5,551	64.4
Sales	9,790	4,188	42.8
Service (excluding household)	6,955	3,953	56.8

This gap is also shown in the distribution of such workers in 1970 by earning levels, as follows:

TABLE II–	Men	Women
Earning less than $7,000	30.1 percent	73.9 percent
Earning $15,000 or over	13.5 percent	1.1 percent

This gap is not due to differences in education or qualification, but exists at every level of educational background as follows:

[14] Fact Sheet on the Earnings Gap, Dec. 1971 (rev.), based on Bureau of the Census Current Population Reports (P-60).

TABLE III—

Median earnings, 1972

Years schooling completed	Men	Women	Women's median income as percent of men's
Elementary school . .	$ 7,535	$4,181	55.5
High School: 1-3 years	8,514	4,655	54.7
4 years	9,567	5,580	58.3
College: 1-3 years . .	11,183	6,604	59.1
4 years . . .	13,264	8,156	61.5
5 years or more	14,747	9,581	65.0

This gap, says the Labor Department, is not necessarily due to women "receiving unequal pay for equal work," but rather because "women are more likely than men to be employed in low-skilled, low-paying jobs." (*Ibid.*, p. 4). The immensity of this sex-based discrimination is dramatized by the above figures which show that in 1970 males who dropped out of high school after their first, second or third year had higher median annual earnings ($8,514) than women with four full years of college education ($8,156), and males with only an elementary school education had higher median annual earnings ($7,535) than females with 1-3 years of college education ($6,604).

By channeling women into the lower paying jobs and reinforcing sex prejudice in employment, the sex-segregated job ads frustrate the basic objective of the fair employment laws.

The situation is similar to that which existed, not long ago, in interstate transportation. Although this Court had repeatedly ruled that racial segregation on common

carriers in interstate transportation was illegal,[15] the continued widespread use of "white only" and "colored only" signs in railroad and bus stations made this Court's decisions "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941). Effective desegregation in interstate transportation facilities began only when the Interstate Commerce Commission issued its regulations in September 1961 (49 CFR 180a.1-10) requiring motor common carriers to display nonsegregation signs and to refrain from using terminals having signs specifying race segregation practices. *Georgia* v. *United States*, 201 F. Supp. 813 (D.C. N.D. Ga. 1961), *affd.* 371 U.S. 9 (1962).

The legislature could reasonably believe that discriminatory job ads promote discrimination in employment, and its determination to prohibit the publication of such ads is a reasonable and rational means for effectuating the proper legislative objective of reducing job discrimination.

B. There is no merit in the petitioner's suggestion that sex-segregated job ads promote the convenience of the job seeker.

The company attempts to justify its sex-segregated job ads policy by contending (p. 10, Petitioner's brief on Petition for Writ of Certiorari) that its sex-segregated column headings "are solely a reflection of what it believes to be in futherance of the most convenient classification for its readers, what is preferred by its

---

[15] *Mitchell* v. *United States*, 313 U.S. 80 (1941); *Morgan* v. *Virginia*, 328 U.S. 373 (1946); *Henderson* v. *United States*, 339 U.S. 816 (1950).

readers, and is [sic] a classification which has a rational basis in that it merely reflects the present dominant employment interest patterns of the sexes."

It was only a short time ago that many newspapers in this country arranged their classified ads on jobs and housing under race labels, and offered precisely the same argument (substitute "race" for "sex") to justify their race-segregated classified ads. Such argument was without merit then, and it should be summarily rejected in this case.

There is much similarity between race discrimination and sex discrimination in employment. The attitudes underlying both types of discrimination have generally reflected the ancient canard about the "inferiority" of women and Negroes (or Oriental, or other proscribed races).[16] Both women and racial minorities are "easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws." *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954). Both are grossly underrepresented in Federal, State, and local formal decision-making processes, leaving both easy targets of public and private discrimination. The history of both women and racial minorities has been marked by unduly slow progress toward legal, economic, and political equality, often in the face of considerable resistance from the dominant group. The result has been that women and racial minorities have often been consigned to the bottom of the economic ladder, in the lowest paying, least satisfying, jobs.

---

[16] *E.g.*, Gunnar Myrdal, *An American Dilemma*, Appendix 5, pp. 1073-1078 (1944); H.M. Hacker, "Women as a Minority Group," 30 *Social Forces* 60 (Oct. 1951) (reprints available from U.S. Women's Bureau).

The similarity between race discrimination and sex discrimination was pithily stated by the Supreme Court of California in *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 18-20, 485 P. 2d 529, 540-41 (1971):

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from non-suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.
>
> Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. . . . Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. . . . They are excluded from or discriminated against in employment and educational opportunities. . . .
>
> Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are

made with respect to a fundamental interest such as employment.

The President"s Task Force on Women's Rights and Responsibilities, citing Census Bureau data, stated in its Report of April 1970, "A Matter of Simple Justice", p. 18:

> Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round full-time is $7,396, of Negro men $4,777, of white women $4,279, of Negro women $3,194. Women with some college education both white and Negro, earn less than Negro men with 8 years of education.
>
> Women head 1,723,000 impoverished families, Negro males head 820,000. One-quarter of all families headed by white women are in poverty. More than half of all headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty. [Footnotes omitted].

Sex-segregated job ads, like race-segregated job ads, do not promote the convenience of the job seeker, except in a community dedicated to unequal job opportunities. This has been amply demonstrated by experience with regard to racial discrimination in employment. It is equally true with regard to sex discrimination.

First. Grouping job ads by sex promotes only the continuance of the tradition that the jobs listed as "Male interest" are not intended for women, and vice versa. It does not promote the convenience of the man or woman who is seeking a job (e.g., as bookkeeper, plumber, cook, welder, printer, secretary, accountant, or other jobs that can be performed by men and women alike and for which

sex is not a bona fide occupational qualification). The job seeker's interests would be promoted far more by grouping the ads solely by job category – so that he or she can pursue all opportunities for the kind of job he or she wants – rather than by a sex label which automatically discourages persons of the other sex from reading the job ads under such sex label. Indeed, if the job seeker, following the Petitioner's suggestion to "assume that the advertiser will consider applicants of either sex" ("Notice to job seekers", ftnt. 2, *supra*), consults both the "Male" and "Female" columns, what then is the point of the sex-segregated job columns?

The grouping of ads alphabetically by occupation without sex-segregated headings is better for the job seeker even in the infrequent case where (a) an employer or employment agency is exempt from the Ordinance, or (b) the position is exempted because it "reasonably requires the employment of a person or persons of a particular . . . sex" (Ordinance, sec. 7(d)). In such cases, the exempted ad, printed with others arranged alphabetically by job title, need simply include the sex designation in the body of the ad. The job seeker could ckeck all ads for the occupation he or she seeks (for bookkeeper, plumber, cook, nurse, etc.) in one place, including the exempted jobs, rather than have to check for such ads in 2 or 3 separate columns.

Furthermore, many (but not all) employers and employment agencies now place duplicate job ads in both the male and female columns in order to avoid a judgment that they discriminate on the basis of sex. *Cf. Hailes* v. *United Air Lines, supra.* The job seeker who wants to check on all jobs for which he or she may be interested in applying must therefore look through longer series of ads in both columns. The Petitioner's assertion

that the sex labeled columns serve the "convenience" of the job seeker is therefore quite hollow. Only when *all* advertisers duplicate their job ads would sex-segregated columns reduce the job seeker's reading burden.

It is, of course, apparent that such duplication in 2 or 3 columns imposes extra expense on those employers and employment agencies that desire to reach both male and female job seekers without discrimination,[17] and that they would be better served if all job ads were arranged alphabetically by job category without sex segregation.

Second. The Court of Common Pleas below found that the evidence presented to the Pittsburgh Human Relations Commission "clearly established that it is not the preference of the reader, but the preference of the prospective employer which dictate [sic] ad placement under one caption or another" and "that the system which the Press seeks to sustain does aid in discrimination in employment based upon sex, and not based upon difference in treatment sanctioned by the law." App., Pet. for Writ of Certiorari, pp. 33a, 34a. The Commonwealth Court below found (*Ibid.*, p. 58a): "The record clearly demonstrates that this sex segregated system of want ad column classification is geared primarily to the interests and desires of employers."

In providing to employers and employment agencies the means of violating the law's prohibition against publishing sex discriminatory job ads, the Petitioner supports a widespread system of violations by such job

---

[17] In this case, the Court of Common Pleas found: "The evidence before the Commission establishes that at least one customer had increased costs of advertising because of duplication of ads in both male and female columns." App., Pet. for Writ of Certiorari, p. 33a.

advertisers. The multiplicity of such violations imposes on the meagerly staffed City, State and Federal commissions an administratively impossible burden of law enforcement. The only effective remedy available to the law is to prevent the central figure–the newspaper–from aiding, inciting (and indeed often coercing) the employers and employment agencies to publish the discriminatory job advertisements which undermine the law's basic purpose of combatting discrimination in employment.

Third. The Petitioner's contention assumes that the newspaper's ad-takers or management know (a) what jobs are preferred by its readers, and (b) what are the "dominant employment interest patterns of the sexes". We submit that they are not so prescient. According to Census Bureau publications,[18] there were, in 1970, 49,549,239 males, and 30,501,807 females, in the civilian labor force, 16 years old and over, of whom 47,623,754 males, and 28,929,845 females, were employed. Their jobs refute much of the mythology about the "employment interest patterns of the sexes." In large numbers, women now work in traditional "men's jobs," and men now work in traditional "women's jobs." Some examples are:

---

[18] *1970 Census of Population*, PC(1)-C1, General Social and Economic Characteristics, U.S. Summary, Table 112, p. 1-418 (June 1972); *Ibid.*, PC(2)-7C, Occupation by Industry, Table 8, pp. 241-248 (October 1972).

TABLE IV– FEMALE WORKERS

	Number of female workers
engineers	19,577
lawyers	12,311
physicians, dentists, optometrists, veterinarians, etc.	45,664
clergymen*	6,237
urban and regional planners	1,099
engineering and science technicians	87,837
draftsmen*	22,257
air traffic controllers	1,370
airplane pilots[19]	710
flight engineers	164
mail carriers, post office	19,566
insurance adjusters and investigators	25,570
blacksmiths	249
boilermakers	371
bulldozer operators	1,135
carpenters	10,978
cranemen*, derrickmen*, and hoistmen*	1,939
electricians	8,616
electric power linemen*, and cablemen*	1,444
excavating, grading and road machine operators, except bulldozers	2,495
forgemen* and hammermen*	724
locomotive engineers	392
locomotive firemen*	151
machinists	11,754
automobile mechanics	11,045
automobile body repairmen*	1,332
heavy equipment mechanics, including diesel	10,713
data processing machine repairmen*	864
railroad and car shop mechanics and repairmen*	510
metal molders	5,749
construction and maintenance painters	13,303
plumbers and pipefitters	4,110
pressmen* and plate printers	13,346
sheetmetal workers and tinsmiths	2,898
shipfitters	123
shoe repairmen*	6,343
stone cutters and carvers	445

*All these "men" were females.

[Table continued on next page]

[19] On January 10, 1973, the Navy announced selection of 8 women to begin flight cadet training to become pilots of Navy transport planes and helicopters. *Washington Post*, p. A-7 (Jan. 11, 1973).

FEMALE WORKERS (Continued)

	Number of female workers
structural metal craftsmen*	868
telephone installers and repairmen*	8,285
telephone linemen* and splicers	756
blasters and powdermen*	311
chainmen,* rodmen,* and axmen,* surveying	163
drillers, earth	3,405
furnacemen,* smelter-men* and pourers	2,761
garage workers and gas station attendants	12,084
meatcutters and butchers	28,054
metal platers	2,828
mine operatives	3,359
drill press operatives	14,831
lathe and milling machine operatives	7,566
punch and stamping press operatives	48,377
riveters and fasteners	10,941
sailors and deckhands	466
stationary firemen*	4,813
welders and flamecutters	31,273
Boatmen* and Canalmen*	324
bus drivers	66,000
deliverymen* and routemen*	19,691
railroad brakemen*	537
railroad switchmen*	867
truck drivers	20,120
construction laborers, except carpenter helpers	9,571
fishermen* and oystermen*	1,147
freight and material handlers	38,760
longshoremen* and stevedores	705
lumbermen,* raftsmen* and woodchoppers	1,766
janitors and sextons (Does not include cleaners and charwomen)	156,755
busboys*	13,528
crossing guards and bridgetenders	23,919
firemen,* fire protection	1,976
guards and watchmen*	16,262
policemen* and detectives	13,098

*All these "men" were females.

TABLE V– MALE WORKERS

	Number of male workers		Number of male workers
dieticians	3,222	chambermaids** and maids**, except private household	10,107
registered nurses	22,332		
secretaries	64,066	cooks, except private household	305,492
stenographers	8,082		
typists	56,834	lay midwives**	138
decorators and window dressers	29,709	practical nurses	8,485
		airline stewardesses**	1,364
dressmakers and seamstresses,** except factory	4,706	child care workers, except private household	9,196
milliners	183	hairdressers and cosmetologists	46,663
sewers and stitchers	54,686		
weavers	23,461	housekeepers, except private household.	29,076

**All males, the word notwithstanding.

These samplings show that the "employment interest patterns of the sexes" are far more varied than the traditional stereotypes. They also show that the assumptions underlying the newspaper company's efforts to direct job seekers into particular kinds of employment are contrary to the employment interests of large numbers of men and women (just as the race-segregated job ads formerly prevalent were contrary to the employment interests of many whites and Negroes.)

This is being increasingly understood by newspapers throughout the country. The following newspapers, which formerly published sex-segregated job ads, now print "help wanted" columns without sex segregation of the job ads:[20]

[20] Some of these newspapers changed voluntarily before, and some after, the EEOC in 1968, and then various State commissions, adopted Guidelines prohibiting placement of job ads in sex-labeled classified ad columns. See text and ftnt. 9, *supra*; and

[Footnote continued on next page]

TABLE VI– Newspapers no longer printing sex-segregated classified job ads.

Albany Times Union
Atlanta Constitution
Baton Rouge (La.) State Times
Bergen (N.J.) Record
Bismarck (N. Dak.) Tribune
Boston Globe
Charleston (W. Va.) Gazette
Chicago Sun Times
Cleveland Plain Dealer
Cleveland Press
Commercial Appeal (Tenn.)
Dayton Daily News
Deseret (Utah) News
Des Moines Register
Detroit News
Florida Times Union
Honolulu Star Bulletin
Houston Post
Indianapolis News
Kansas City Star
Los Angeles Times
Miami Herald
Minneapolis Star Tribune
Newark Evening News
Newark Star Ledger
Newsday (L.I., N.Y.)
New York Daily News
New York Law Journal
New York Post
New York Times
News and Courier (Charleston, S.C.)
Oakland (Calif.) Tribune
Omaha World Herald
Oregonian
Portland (Maine) Press
Providence (R.I.) Journal
Red Bank (N.J.) Daily Register
St. Louis Post Dispatch
St. Petersburg Times
San Francisco Chronicle
Seattle Times
Tampa Tribune
Times Picayune (La.)
Virginia Pilot (Norfolk, Va.)
Waco (Tex.) Tribune-Herald
Wall Street Journal
Washington Evening Star
Washington Post
Wilmington (Del.) Evening Journal

Appendix of this Brief, *post.* Others changed pursuant to orders from State Commissions. *E.g., Hinfrey* v. *Red Bank Register* (E13BS-4806, N.J. Dept. of Law & Pub. Safety, Div. on Civ. Rts., Oct. 27, 1971); *Commission* v. *Evening Sentinel* (FEP-Sex 1-5, 29-1, Conn. Comm. Hum. Rts., June 30, 1972); Order, Iowa Civ.

[Footnote continued on next page]

The lesson of these facts is clear: The sex-labeled headings on job ad columns simply permit (or force) the advertisers to sex-label their help-wanted ads in defiance of the nondiscrimination law. Such classified ads aid and coerce the commission of the unlawful employment practices prohibited by the Ordinance.

II. THE PITTSBURGH ORDINANCE AS ENFORCED BY THE COURT BELOW – REQUIRING THE PETITIONER TO CEASE SEX-SEGREGATED LABELING FOR JOB ADS IN ITS NEWSPAPER UNLESS THE ADVERTISER OR POSITION IS EXEMPT UNDER THE ORDINANCE – REGULATES THE COMMERCIAL ACTIVITY OF SELLING ADVERTISING SPACE, IMPOSES LITTLE OR NO BURDEN ON THE PETITIONER, AND DOES NOT ABRIDGE FREEDOM OF SPEECH OR OF THE PRESS WITHIN THE MEANING OF THE FIRST AMENDMENT.

The basic purpose of the Pittsburgh Ordinance is to eliminate discrimination based on race, religion, sex, etc., in employment, housing, and public accommodations. To

---

Rts. Comm., Labor Rel. Rep., FEP 451:407, 1972. Some may have been persuaded by economic or other reasons. *E.g.*, the Bell System telephone companies in July 1971 adopted a policy not to place classified job ads solely in Male- or Female-headed columns and to try to persuade newspapers to provide job ad columns without sex segregation. AT&T letter, July 9, 1971, Bell Exh. 1, Attachment C, FCC Docket 19143. This policy was ratified in the consent order of January 18, 1973 whereby the EEOC, Labor Department and the American Telephone and Telegraph Co. agreed on new nondiscrimination affirmative action programs, including $15 million back-pay to minorities and women previously subjected to racial or sex discrimination. *EEOC* v. *Bell System*, CA 73-149, U.S. Dist. Ct. E.D. Pa.

accomplish this purpose, the Ordinance forbids those subject to its nondiscrimination requirements from publishing or circulating, or causing to be published or circulated, a discriminatory notice or advertisement relating to those matters. This prohibition was made in the belief that such discriminatory advertisements provide a major vehicle for accomplishing the forbidden acts of discrimination.

This prohibition against publication or circulation of discriminatory advertisements is not loosely or vaguely worded. On the contrary, it is precisely stated in section 8(e) as to unlawful employment practices; in section 9(d) as to unlawful housing practices; and section 10(a)(2) as to unlawful public accommodation practices. And sections 8(j), 9(g) and 10(b) of the Ordinance prohibit "any person" from aiding, inciting, compelling or participating in such respective unlawful practices.

Nor is the Ordinance aimed solely at publication in the media (i.e., newspapers, magazines, radio, or television). It precludes "any person" from publishing the discriminatory notice or advertisement, whether in a general newspaper or on his own. Indeed, it is not aimed at *any* function of a newspaper except when the publisher of the newspaper (a) acts discriminatorily in the role of an employer, employment agency or labor union, or landlord or seller of housing, or owner of a publicly available auditorium; or (b) publishes a discriminatory notice or advertisement relating to the forbidden employment, housing, or public accommodations practice.

Nothing in the Ordinance or the order of the court below touches even a scintilla of the Petitioner's freedom of speech or press. The Petitioner is in no way prohibited or hindered in publishing editorials, news articles, comments, cartoons, statements, or any other format for

expressing its views, or the views of its "Editor, Business Manager and Classified Ad Manager" (Petitioner's Brief, p. 11), or its writers or readers, on any subject. It is free to expound on what jobs should be held by men or by women, or whether sex discrimination in employment is good or bad, or whether laws barring such discrimination should be expanded or repealed, or the soundness of the court's order requiring it to eliminate sex-segregated column headings in its job ads, or any other topic.

Furthermore, the Ordinance places virtually no burden on a newspaper which, like the Petitioner, publishes classified job ads. Classifying the job ads by occupation is surely not burdensome. The Petitioner does so now. Even if a prospective advertiser insists on having a job ad printed with a sex designation, or under a sex-labeled heading, the newspaper is not obliged to exercise any burdensome judgment. It need only require the prospective advertiser to produce a certificate of exemption from the Human Relations Commission under section 7(d) of the Ordinance, and the newspaper may then print the job ad with the sex label.

The Ordinance is thus narrowly drawn to deal with the evil of promoting discrimination based on race, religion, sex, etc., *in the context of a commercial advertisement* which seeks to fill a particular job, or to sell or rent a particular house or apartment, or to restrict admission into a particular place of public accommodation. It does not cut down in any way the newspaper's right or ability to express its views for or against the merits of the anti-discrimination requirements of the law.

Even if the Ordinance somehow burdened the Petitioner, "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal

statutes of general applicability." *Branzburg* v. *Hayes*, 408 U.S. 665, 682 (1972). This Court has repeatedly held that the First Amendment does not immunize the press from laws of general application, such as the National Labor Relations Act,[21] the Fair Labor Standards Act,[22] the Sherman Anti-Trust Act,[23] and nondiscriminatory tax laws not directed against the expression of views.[24] Lower Federal courts have ruled similarly in cases upholding laws prohibiting the publishing of advertisements which directly promoted a particular existing lottery (but not inhibiting free expression of ideas as in editorials, etc.),[25] and laws prohibiting "blockbusting" advertising, *i.e.*, making representations regarding entry of persons of a particular race, religion or national origin into a neighborhood in order to induce sales or rentals of dwelling units.[26]

---

[21] *Associated Press* v. *NLRB*, 301 U.S. 103 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws." P. 132).

[22] *Oklahoma Pres Publ. Co.* v. *Walling*, 327 U.S. 186 (1946); *Mabee* v. *White Plains Publ. Co.*, 327 U.S. 178 (1946) ("As the press has business aspects, it has no special immunity from laws applicable to business in general." P. 184).

[23] *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (upheld injunction forbidding publisher to discriminate as to *arrangement and location of advertisements* by an advertiser who also placed ads in other media. P. 157); *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268 (1934).

[24] *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943); *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

[25] *New York State Broadcasters Assn.* v. *United States*, 414 F.2d 990, 997 (C.A. 2, 1969), *cert. den.* 396 U.S. 1061 (1970).

[26] *United States* v. *Bob Lawrence Realty*, 313 F. Supp.870, 872 (D.C. N.D. Ga. 1970) ("It is evident that the statute does not make mere speech unlawful. What it does make unlawful is

In particular, the Petitioner's attempt to invoke the First Amendment as a shield against the Ordinance fails to recognize the solid demarcation between the expression of ideas protected by the First Amendment, and conduct in operating a publishing business in a wholly commercial context which that Amendment does not immunize from governmental regulation.

There is a world of difference, so far as the First Amendment is concerned, between "communicating information . . . and opinion" and "purely commercial advertising."[27] Thus, while the First Amendment protects from governmental regulation an editorial or a panel debate on the merits of cigarette smoking, it does not immunize against a statute prohibiting the advertising of cigarettes for sale.[28]

---

economic exploitation of racial bias and panic selling. We conclude that the statute is one regulating conduct, and that any inhibiting effect it may have on speech is justified by the Government's interest in protecting its citizens from discriminatory housing practices and is not violative of the First Amendment."); *United States* v. *Mitchell*, 327 F. Supp. 476, 486 (D.C. N.C. Ga. 1971); *United States* v. *Mintzes*, 304 F. Supp. 1305, 1312 (D.C. D. Md. 1969).

[27] *Valentine* v. *Chrestenson*, 316 U.S. 52, 54 (1942); *Breard* v. *Alexandria*, 341 U.S. 622, 641-645 (1951) (soliciting magazine subscriptions); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139 (1969) ("Neither news gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices" of newspapers.)

[28] *Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000 (1972), *affg.*, 333 F. Supp. 582 (D. D.C. 1971); *Banzhaf* v. *FCC*, 405 F.2d 1082, 1101-1102 (D.C. Circ. 1968), *cert. den.* 396 U.S. 842 (1969) ("Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not

[Footnote continued on next page]

The principal purpose of classified ads in newspapers is not to express the newspaper publisher's belief, or even the belief of its advertisers, about the social utility of sex discrimination in employment. Instead, the job ads are intended solely to solicit employees for the advertisers, and money for the newspapers.[29] Hence, they are wholly unlike the advertisements and books involved in the cases which the Petitioner's Brief (p. 16) cites as granting First Amendment protection to commercial publications. In *New York Times* v. *Sullivan*, 376 U.S. 254, 266 (1964), the full-page advertisement in the New York Times protesting police brutalities against Negroes in Alabama "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." In *Smith* v. *California*, 361 U.S. 147 (1959), the imposition of absolute criminal liability on the sale of obscene books, regardless of *scienter*, would have inhibited distribution of, and public access to, constitutionally protected books and literature as well as obscene material. No such *in terrorem* effect results from the

---

provide information on matters of public importance, and is not, except for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices.")

[29] According to data from MEDIA RECORDS 16, 18, *Classified Advertising of the First Fifty Sunday and Morning Newspapers* (1970): "... Published lineage figures for the first eleven months of 1970, for example, were $16,673,673 for the morning Los Angeles Times and $10,973,049 for its Sunday paper. A rule of thumb sets help-wanted advertising at approximately one-third of a newspaper's total commercial lineage...." Boyer, "Help-Wanted Advertising—Everywoman's Barrier," 23 Hastings L.J. 221, 223, ftnt. 7 (Nov. 1971).

Pittsburgh Ordinance's prohibition against sex-segregating job ad columns.

We believe that the proper line between constitutionally protected free speech and commercial discriminatory advertising which the legislature may prohibit was correctly drawn in Senior Circuit Judge Sobeloff's unanimous opinion in *United States* v. *Hunter*, 459 F.2d 205 (CA 4, 1972), *cert. den.* 93 S. Ct. 235 (October 16, 1972), under reconsideration in No. 72-146. In that case, a newspaper published a classified advertisement to rent an apartment in a "white" home. Section 804(c) of the Civil Rights Act of 1968 (42 U.S.C. 3604(c)) prohibits publication of any advertisement concerning sale or rental of a dwelling which indicates "any preference, limitation, or discrimination based on race, color, religion, or national origin. . .", and thus, except as to sex, is virtually identical with section 9(d) of the Pittsburgh Ordinance. Judge Sobeloff's opinion flatly rejected the newspaper's contention that the First Amendment precluded applying section 804(c) to a newspaper. The *Hunter* case involved a Federal statute and race discrimination in a housing ad, while this case involves a local ordinance and sex discrimination in job ads. But there is no difference in principle. Judge Sobeloff's view that the First Amendment does not immunize a newspaper from a statute prohibiting publication of discriminatory classified ads is equally applicable to the First Amendment contention in this case.

We believe that the Petitioner's First Amendment argument in this case is so insubstantial as to verge on the frivolous.

II. THE ORDER OF THE COURT BELOW DID NOT VIOLATE DUE PROCESS AND THE PETITIONER'S DUE PROCESS ARGUMENT MISAPPREHENDS THE BASIS FOR THAT ORDER.

The Petitioner's contention that its right to due process of law was violated by the court below is based on something that court did not do. According to Petitioner, the court below ruled that the Petitioner's sex-labeling of job ads "aided an employer in discrimination in hiring . . . without proof that an advertiser discriminated in hiring" (Pet. Brief on Petition for Certiorari, p. 14). At another page (p. 16), the Petitioner says that it was "found as aiding in the discrimination in hiring of women without knowledge that any advertiser has in fact used its classified advertisements as a device to deny women equal consideration for employment positions."

But that isn't what the Court below ruled.

The Petitioner's argument misapprehends the basis for the order of the court below. That court didn't say that Petitioner had "aided an employer in discrimination in hiring." It ruled only that the Petitioner had aided an employer in doing one particular act – publishing a job ad which indicates sex discrimination – which the statute "declared to be an unlawful employment practice."

Section 8 of the Ordinance has 10 subparagraphs – (a) through (j) – defining various kinds of unlawful employment practices. One of these occurs when an employer, employment agency, or labor organization causes to be published or circulated a notice or advertisement relating to employment or membership which "indicates" any discrimination because of race, religion, sex, etc. (Sub-

paragraph (e), which is modeled on section 704(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(b)). Subsection 4(b) of the Ordinance defines discrimination as constituting "any difference in treatment based on" race, sex, etc. Thus, the unlawful employment practice specified in subsection (e) is the act of causing to be published or circulated a notice or advertisement which "indicates" a "difference in treatment" based on race, sex, etc. It is that practice which the newspaper aided, and thereby violated subsection 8(j) of the Ordinance, which forbids "any person" to aid or compel "the doing of any act declared to be an unlawful employment practice."

It was unnecessary for the Commission to prove that an advertiser had engaged in *other kinds of unlawful employment practices* (such as refusing to hire or to promote, or otherwise discriminating against, any employee or prospective employee because of race, sex, etc.) in order to hold that the Petitioner violated subsection (j) by aiding in "the doing of" the unlawful employment practice defined in subsection (e). The Commission's finding that the Petitioner aided advertisers in committing the unlawful employment practice defined in subsection 8(e) was fully in accord with the plain structure and purpose of the Ordinance, and the Petitioner had full notice and opportunity to contest the charge. Hence, the order of the court below did not violate the Petitioner's rights to due process of law.

CONCLUSION

The ruling of the court below – that the Petitioner violated section 8(j) of the Pittsburgh Ordinance by aiding the commission of an unlawful employment

practice prohibited by subsection (e), namely, publishing a job ad which indicated difference in treatment in employment based on sex, with respect to jobs not exempt under the Ordinance – was constitutional and correct, and should be affirmed.

Respectfully submitted,

PHINEAS INDRITZ
ELIZABETH BOYER
MARGUERITE RAWALT
MARTHA W. GRIFFITHS
MARGARET M. HECKLER
DONALD M. FRASER

February 15, 1973

Attorneys for the amici curiae:

AMERICAN VETERANS COMMITTEE, INC.;
WOMEN'S EQUITY ACTION LEAGUE LEGAL DEFENSE AND EDUCATIONAL FUND, INC.;
NATIONAL ASSOCIATION OF WOMEN LAWYERS;
LEAGUE OF WOMEN VOTERS OF THE UNITED STATES

APPENDIX

STATE FAIR EMPLOYMENT LAWS PROHIBITING SEX DISCRIMINATORY ADVERTISING

Alaska, Stats. §18.80.220(a)(3); CCH-*Employment Practices Guide*, ¶20,218.

Arizona Rev. Stat., §41-1462(3); CCH-EPG, ¶20,405.

California, Labor Code, Part 4.5, §1420(d); CCH-EPG, ¶20,811.

Colorado Rev. Stats., §80-21-6(7)(c); CCH-EPG, §21,006.

Connecticut Gen. Stats., §31-126(f); CCH-EPG, ¶21,205.

District of Columbia Police Regs., Art. 47, §4(d)(ii); CCH-EPG, ¶21,604.

Hawaii Rev. Stat., Tit. 21, §378-2(3); CCH-EPG ¶22,002.

Idaho Code, §67-5909(4); CCH-EPG ¶22,209.

Illinois Rev. Stat. ch. 48, §851-867 (1971) and Commission Guidelines of Nov. 3, 1971, Art. IV(B), CCH-EPG, ¶22.497.04.

Iowa Code Ann., Tit. 40, §601A.7.1(c); CCH-EPG ¶22,807, and Commission Guidelines of Nov. 5, 1970, §1.1 and 1.2, CCH-EPG ¶22,875.

Kansas Stats. §44-1009(a)(3); CCH-EPG ¶23,008; and Commission Guidelines of Oct. 21, 1972, §21-32-8, CCH-EPG, ¶23,093.08.

Kentucky Stats. §344.080; CCH-EPG ¶23,208.

Maryland Code Ann., Art. 49B, §19(e); CCH-EPG ¶23,812.

[List continued on next page]

Massachusetts Gen. Laws, Ch. 151B, §4(3); CCH-EPG ¶24,005 and Commission Guidelines Art. B, CCH-EPG ¶24,051.11.

Michigan Comp. Laws, §423.303a(d); CCH-EPG ¶24,203a.

Minnesota Stats. §363.03 Subdiv. 1(4)(b); CCH-EPG ¶24,403 and Commission Guidelines eff. June 22, 1971 §6; CCH-EPG ¶24,490.06.

Missouri Rev. Stat. §296.020(3); CCH-EPG ¶24,802.

Nebraska Rev. Stat. §48-1115; CCH-EPG ¶25,115.

Nevada Rev. Stat., §613.340.2; CCH-EPG ¶25,204.

New Hampshire Rev. Stat. Ann., §354-A:8.3; CCH-EPG ¶25,408.

New Jersey Rev. Stat., §10:5-12.C; CCH-EPG ¶25,614.

New Mexico Stats. §4-33-7(d); CCH-EPG ¶25,807.

New York Consol. Laws, Executive Law, §296-1(d) and 1-a(d); CCH-EPG ¶26,007.

Oklahoma Stats. §25-1306; CCH-EPG ¶26,861.

Oregon Rev. Stat. §659.030-(3); CCH-EPG ¶27,007.

Pennsylvania Purdon's Penn. Stat. Ann., Tit. 43, §955(b)(2); CCH-EPG ¶27,204 and §2 of Commission Guidelines as amended Dec. 25, 1971 (1 Pa. Bull. 2359), CCH-EPG ¶27,296.02.

Puerto Rico, Act 100 of June 30, 1959, as amended by Act 50, Laws 1972, sec. 1-A.

Rhode Island Gen. L., §28-5-7(d)(4); CCH-EPG ¶27,507.

South Dakota Comp. L., §20-13-13(4); CCH-EPG ¶27,806.

[List continued on next page]

Utah Code Ann. §34-35-6(d); CCH-EPG ¶28,106.

Vermont Stats. Ann., Tit. 21, §495(2); CCH-EPG ¶28,201.

Washington Rev. Code, §49.60.180(4) and 49.60.200; CCH-EPG ¶28,518 and ¶28,520.

West Virginia Code, §5-11-9(b)(2) and (d)(4); CCH-EPG ¶28,709.